



May 24, 2001

Ms. Julie Joe
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2001-2155

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 147625.

The Office of the Attorney General (the "OAG") received a request for all correspondence, since July, 1997, from the Public Agency Representation Section of the Consumer Protection Division (the "PAR") to the Texas Department of Transportation ("TxDOT"), that concerns TriStem, L.L.C. ("TriStem"), the requestor (President of TriStem), or anyone else related to TriStem.¹ You advise that certain information responsive to the request has been released to the requestor. You have submitted for our review a representative sample of the responsive information the OAG seeks to withhold. You assert that this information is excepted from disclosure under sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹The submitted written request is more broad, but you explain that the requestor subsequently narrowed the scope of the request to encompass the information described above.

² We assume that the "representative sample" of records submitted to this office is truly representative of the responsive records the OAG seeks to withhold. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991); *see also* Open Records Decision No. 301 (1982) (hearings before Public Utility Commission constitute litigation for purposes of statutory predecessor to section 552.103). Litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You advise that a contested case is pending before the Public Utility Commission, and that the PAR is representing TxDOT in the matter. In this instance, you have thus demonstrated that litigation for purposes of section 552.103(a) was pending at the time the OAG received the instant request. Based on your representations and our review of the submitted materials, we also find that the requested information that the OAG seeks to withhold relates to the pending litigation. Thus, except as otherwise provided below, the OAG may withhold the information at issue at this time pursuant to section 552.103(a).

Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). You explain that some of the information at issue was previously made available to the requestor in his capacity as a consultant hired by TxDOT. We understand you to argue that such prior release to the requestor was not a release to the public. *See* Gov't Code § 552.007 (prohibiting selective public disclosure of non-confidential information). We agree that the release of the information to the requestor in his capacity as a hired consultant for the OAG's client in the pending litigation did not constitute a release to the public, and thus did not trigger the Act's selective public disclosure prohibition. *See, e.g.*, Open Records Decision No. 666 (2000) (release of information to citizen advisory board did not implicate section 552.007). We also understand you to assert that the prior release to the requestor does not prevent the OAG from now withholding the information under section 552.103(a). We agree, in that we have no indication that the information previously released to the requestor was also released to the opposing party in the pending litigation. However, we have marked with green flags four pages in the submitted sample that the OAG evidently obtained from the opposing party. This information thus appears to have been made available to all parties. If so, it is not protected

by section 552.103(a) and must be released.³ Finally, we advise that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Because section 552.103 is dispositive, we do not address your other claimed exceptions except as noted in footnote 3.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

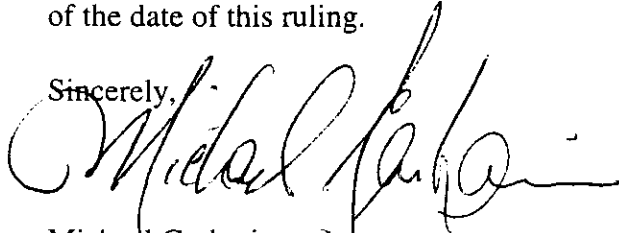
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

³To the extent the information has previously been made available to all parties in the pending litigation, such information is likewise not protected by the other claimed exceptions.

complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", written over the word "Sincerely,".

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 147625

Encl. Submitted documents

cc: Mr. Joe Seeber
President
Tri-Stem, LLC
2908 Stewart Drive
Waco, Texas 76708
(w/o enclosures)